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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOE JOHN ESPARZA, Defendant and Appellant.	E046371 (Super.Ct.No. FVA800696) OPINION

APPEAL from the Superior Court of San Bernardino County. Dwight W. Moore, Judge. Affirmed.

John D. O'Loughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, and Rhonda-Cartwright-Ladendorf and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Joe John Esparza was convicted of robbery (Pen. Code, § 211[1]) and burglary (§ 459). He was sentenced to two years in state prison. He appeals, contending the trial court abused its discretion in denying his *Marsden*[2] motions, and erred in failing to instruct, sua sponte, on battery as a lesser included offense to robbery and on self-defense to excessive force. He also claims that he received ineffective assistance of counsel.

I. PROCEDURAL BACKGROUND AND FACTS

On January 12, 2008, defendant went to the Stater Bros. market in Fontana. He was pushing a shopping cart with a black plastic bag in the child seat. Rafael Hernandez, a loss prevention officer, watched defendant place a small bag of laundry detergent into the bag. After walking around the store, defendant took items out of the black bag and placed them in his jacket. Hernandez radioed his observations to his coworkers. Greg Romano, an investigator for Stater Bros., heard Hernandez's broadcast and went outside to wait for defendant.

Defendant walked out of the store without paying for the items in his jacket. Romano began to follow defendant. Randy McDowell, another security officer, approached defendant and identified himself. Romano grabbed defendant from behind, placed one arm around defendant's neck and used the other to grab defendant's arm.

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[1] All further statutory references are to the Penal Code unless otherwise noted.

[2] *People v. Marsden* (1970) 2 Cal.3d 118.

Defendant bent forward, picking Romano off the ground. A struggle ensued, during which Romano and McDowell yelled, "'Stater Bros. security. Stop resisting.'" Hernandez witnessed the struggle with defendant and heard the command to stop resisting. Hernandez assisted in handcuffing defendant. Defendant demanded to see Romano's badge. As Romano was showing defendant his badge, defendant kicked him in the groin.

The officers took defendant to the employee break room. A search of defendant's jacket produced laundry detergent, a bag of Cheetos,[3] two bags of Almond Joy candy bars, a package of tortillas, a deli salad, two dressings and some shaving razors. Defendant had no money or credit cards. He told Fontana police officer Steve Carney that he was hungry. Defendant said he had lost his job and had come to the store to get some food.

II. *MARSDEN* MOTIONS

Defendant contends the trial court abused its discretion by denying his initial *Marsden* motion. He further claims that the "abuse of discretion was aggravated" when the court dismissed his second *Marsden* motion because he had nothing different to offer.

A. Additional Factual Background

Defendant's *Marsden* hearing was held on May 14, 2008. Defendant told the court that he wished to discharge his attorney because counsel had not given him

[3] The reporter's transcripts states "Chitos."

discovery, i.e., copies of the police reports, preliminary hearing transcripts and certain evidence. Defendant expressed his concern that counsel did not have his (defendant's) "best interest at hand."

In response, defense counsel explained that he had denied defendant's request for discovery "today." Counsel stated that although the case had been in the public defender's office for "a while," he had been just recently assigned to it and had not yet fully reviewed the record. Counsel stated that he had had a lengthy discussion with defendant, but it was unproductive because defendant dwelled upon insignificant details. Although counsel had not yet decided whether to provide defendant with the discovery, his practice was to refrain from doing so when he believed that his client would be sidetracked by unimportant minutia.

The trial court denied defendant's motion after stating the following reasons. First, this was defense counsel's "second day on the job," and thus, it was a "little early to go firing" him. Second, defendant did not have an "absolute right" to discovery, and thus, counsel's failure to provide it was not grounds for discharging him. And finally, nothing had been presented to persuade the court that counsel was not doing an adequate job of representing defendant. Defendant then complained that he could not work with counsel. The court asked counsel whether there had been an "irremediable breakdown in the attorney-client relationship," and counsel replied, "No. I think there's an effort to manipulate the Court."

About one month later, on June 23, defendant moved to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). The court explained the dangers of self-representation. After informing defendant that the trial was scheduled to begin that day, defendant inquired as to bringing another *Marsden* motion. The court replied: "Well, has anything changed? Is there anything different? You had a *Marsden* motion. Is there anything different about your position with [defense counsel] than it was the last time?" Defendant stated simply that they continued "bumping heads." After the court informed defendant that he could argue ineffective assistance of counsel on appeal, if his attorney made an error, defendant changed his mind and indicated that he was satisfied with his counsel.

B. Standard of Review

We review the trial court's denial of a motion to substitute counsel for abuse of discretion. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.) "Denial 'is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel. [Citation.]' [Citation.]" (*Ibid.*)

C. Analysis

The federal and state Constitutions guarantee a criminal defendant the effective assistance of counsel at all critical stages of a prosecution (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15), and this includes the right to the appointment of counsel for indigent defendants. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 344-345; *Marsden*, *supra*, 2

Cal.3d at p. 123.) “‘“‘“When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney’s inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].’ [Citations.]”’ [Citation.]” (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1085.) After the defendant has been afforded the opportunity to explain the grounds for his motion to substitute counsel, the trial court has discretion to deny the motion unless the defendant has made a sufficient showing of a substantial impairment of his right to counsel. (*People v. Burton* (1989) 48 Cal.3d 843, 855.)

Regarding defendant’s first *Marsden* motion, we agree with the trial court and conclude that defense counsel had not been defendant’s lawyer long enough to conclude that an irreconcilable conflict existed. (*People v. Barnett, supra*, 17 Cal.4th at p. 1086.) “A trial court is not required to conclude that an irreconcilable conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness.” (*People v. Crandell* (1988) 46 Cal.3d 833, 860, overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) Moreover, mere disagreement over trial tactics or strategy does not justify the appointment of a new attorney. (*People v. Crandell*,

supra, at p. 854.) Defendant's complaint that defense counsel was no help because he would not provide discovery that day is too vague and general to justify the substitution of counsel. (*People v. Horton* (1995) 11 Cal.4th 1068, 1103.)

Regarding the court's dismissal of defendant's attempt to make a second *Marsden* request, the People contend the record fails to demonstrate that defendant was attempting to initiate a second *Marsden* motion. Instead, they claim that he was merely exploring his options regarding his *Faretta* motion. We agree. Defendant did not unequivocally make a second *Marsden* motion. Instead, he stated, "And you won't let me have another *Marsden* hearing as far as releasing [defense counsel] from me?" After the court asked if there was anything different to offer, defendant replied that they "just keep bumping heads." Given the same complaint, which appears to be a disagreement over trial tactics or strategy, the trial court was correct in informing defendant that a *Marsden* motion based on the same complaint would be denied. The trial court did not abuse its discretion in denying defendant's *Marsden* motion.

III. BATTERY AS A LESSER INCLUDED OFFENSE TO ROBBERY

Defendant contends the trial court had a duty to instruct sua sponte on battery as a lesser included offense to the charge of robbery. We disagree.

"[A] trial court must instruct the jury sua sponte on an uncharged offense that is lesser than, and included in, a greater offense with which the defendant is charged only if there is substantial evidence that, if accepted, would absolve the defendant from guilt of the greater offense but not the lesser." (*People v. Waidla* (2000) 22 Cal.4th 690, 737.) A

crime is a lesser included offense of another "if it meets either of the following tests: 1) 'Legal elements' test: The greater statutory offense cannot be committed without committing the lesser offense because all the elements of the lesser offense are included in the elements of the greater; 2) 'Accusatory pleadings' test: The charging allegations of the accusatory pleading include language describing the offense in such a way that if committed in that manner the lesser offense must necessarily be committed. [Citation.]" (*People v. Stewart* (2000) 77 Cal.App.4th 785, 795.)

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Battery is defined as "any willful and unlawful use of force or violence upon the person of another." (§ 242.) While the legal elements test considers a taking by either force *or* fear, (§ 211) in this case, the accusatory pleading alleged that defendant used force *and* fear in committing the robbery. According to the pleading, force (which is also an element of the crime of battery) was used in the robbery. While the parties disagree on whether battery is a lesser included offense to robbery, under the facts of this case, we need not decide this issue because there was no evidence that defendant committed simple battery but not robbery. A trial court has a duty to instruct sua sponte on a lesser included offense only if there is substantial evidence that the lesser offense, but not the greater, was committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162.)

Defendant contends, "There was great reason for the jury to doubt that the force [defendant] used was a 'means' of carrying away the property." Specifically, he claims that "[a] more reasonable explanation for his bending forward and lifting Romano's feet off the ground was that he was surprised and reacted to being grabbed from behind," and that "[h]is struggle after being 'taken to the ground' . . . is so congruent with resisting excessive force . . . ." The People disagree and argue the evidence shows that immediately after defendant exited Stater Bros., McDowell approached him from the front and identified himself. Then, Romano grabbed defendant from behind to prevent him from fleeing. Despite the fact that defendant knew he had been detained by store security, defendant bent forward and attempted to break Romano's hold. Defendant continued to struggle for a period of time, during which the officers repeatedly identified themselves and requested that he stop resisting. Because defendant had yet to reach a place of temporary safety, the robbery was not complete. Clearly, the battery or use of force upon the security officers was one of the means by which defendant robbed Stater Bros. Based on the evidence, no reasonable juror could have concluded that a simple battery, but not robbery, was committed.[4]

[4] Noting that the jury was instructed on petty theft as a lesser included offense, the People argue that, if the jury had accepted counsel's argument that the officers had taken down defendant prior to his realizing what was happening, the jury could have determined that the taking was not accomplished by force or fear and would have convicted him of petty theft. Because the jury did not do that, it is not probable that defendant would have received a more favorable outcome with an instruction on battery. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) We agree.

IV. SELF-DEFENSE TO EXCESSIVE FORCE

Defendant contends the trial court had a sua sponte duty to instruct on self-defense. He argues that where, as here, he is charged with battery, even as a lesser offense, and excessive force is used, the court is under a sua sponte duty to instruct on self-defense as a defense to excessive force provided there is substantial evidence to support such defense. The People respond that self-defense is not a defense to robbery, and thus, the court had no duty to instruct. We agree with the People.

"'A trial court has a duty to instruct the jury "sua sponte on general principles which are closely and openly connected with the facts before the court." [Citation.] . . . [A] trial court has a sua sponte duty to give instructions on the defendant's theory of the case, including instructions "as to defenses '"that the defendant is relying on . . ., or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."'" [Citation.]' [Citation.]" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 872.)

Section 693, in relevant part, provides: "Resistance sufficient to prevent the offense may be made by the party about to be injured: [¶] 1. To prevent an offense against his person, or his family, or some member thereof." Relying on *People v. White* (1980) 101 Cal.App.3d 161, defendant argues that his "bending forward when agent Romano grabbed him in a bear hug from behind as McDowell was 'distracting' him, lifting Romano's feet a few inches off the ground—is consistent with an instinctive defensive reaction. His struggle with the agents who immediately 'took him to the

ground' leaving a pool of blood on the pavement is consistent with self defense against excessive force." We disagree.

First, self-defense is not a defense to robbery. (*People v. Costa* (1963) 218 Cal.App.2d 310, 316.) Second, as noted above, given the facts of this case, defendant was using force as a means of getting to a place of temporary safety. Third, the evidence fails to support a finding that defendant was acting in self-defense because he did not know who had grabbed him. If he was not aware that the officers that grabbed him were loss prevention officers then why did he demand to see their badges? For these reasons, we conclude the trial court had no duty to instruct the jury on self-defense.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant faults his trial counsel for failing to argue that "[defendant] did not use force as a means to accomplish the robbery, but in an instinctive defensive reaction and futile expression of anger . . . ." According to defendant, his counsel "argued every conceivable thing except the critical issue. Counsel expressed his hostility to the jurors because they were lazy and watched too much TV and did not, like the founding fathers, read, debate and think critically . . . . He argued that there were no videos of [defendant] taking things; no fingerprints taken from the recovered items, no recovered black bag . . .; that agent McDowell, whom Romano testified had identified himself as a security guard, did not testify . . .; that the guards were lying to cover up their liability for beating and bloodying [defendant] . . .; that there were no video cameras in the back room where the

guards took [defendant] and allegedly recovered the stolen property from his jacket. . . . He argued that all of the prosecution's evidence was 'made up . . . .'"

In order to prove that defendant had ineffective assistance of counsel, defendant has the burden of establishing that: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; see also *People v. Burgener* (2003) 29 Cal.4th 833, 880.) Tactical errors are generally not reversible and defense counsel's tactical decisions should be evaluated in the context of available facts, not in the """harsh light of hindsight."""" (*People v. Hinton* (2006) 37 Cal.4th 839, 876.)

Here, counsel's closing argument asserted the failure on the prosecution's part to prove the case beyond a reasonable doubt. Counsel pointed out the absence of specific evidence (the black bag that was in the cart), along with inconsistencies (which lanes defendant bypassed when leaving the store). Counsel questioned why defendant was taken into a room with no cameras after he was detained. According to defense counsel, defendant was an innocent man whom the loss prevention officers had tackled to the ground and then planted the food on to avoid liability for their mistake. As the People aptly note, given defense counsel's argument, it was reasonable for defense counsel to discount the physical altercation between defendant and the officers so that the "force" element of robbery was not emphasized.

Notwithstanding the above, defendant has not shown that he was prejudiced by his attorney's actions. Given the record, we conclude that it is not reasonably probable that defendant would have received a more beneficial verdict had counsel argued that defendant did not use force to take the food, but rather to defend himself.

VI. DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

MILLER
J.